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IN THE COURT OF CRIMINAL APPEALS

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OF THE STATE OF TEXAS

Ex parte Charles Barton, Appellant

Appeal from Tarrant County

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

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No. PD-1123-19

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

Ex parte Charles Barton, Appellant

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Texas Penal Code section 42.07(a)(7) plainly prohibits a person from sending repeated electronic communications with the intent to harass and in a manner reasonably likely to harass. That conclusion does not change simply because the criminal justice system is made of humans, who sometimes disagree or err.

STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant oral argument.

ISSUES PRESENTED

The first issue is procedural: whether an overbreadth complaint is preserved by the utterance of First Amendment buzzwords. The second issue is substantive: whether Section 42.07(a)(7) is unconstitutionally vague.[1]

[1] Any reference to a "section" or "subsection" is to the penal code unless otherwise stated.

STATEMENT OF FACTS

I. The statute at issue.

Appellant was charged with a violation of TEX. PENAL CODE § 42.07(a)(7), harassment by repeated electronic communications, which says:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person:
> . . .
> (7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.[2]

At the time of the offense, "electronic communication" meant

> a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system. The term includes:
>
> > (A) a communication initiated by electronic mail, instant message, network call, or facsimile machine; and
> >
> > (B) a communication made to a pager.[3]

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[2] TEX. PENAL CODE § 42.07(a)(7).

[3] Acts 2001, 77th Leg., ch. 1222, § 1, eff. Sept. 1, 2001. "Electronic communication" now explicitly includes communications initiated "through the use of . . . a cellular or other type of telephone, a computer, a camera, text message, a social media platform or application, an Internet website, [or] any other Internet-based communication tool[.]" TEX. PENAL CODE § 42.07(b)(1).

II. Appellant's arguments at trial and on appeal.

Appellant challenged the constitutionality of the statute in a motion to quash and in a pretrial application for writ of habeas corpus.[4] A hearing was held on each.[5] The trial court considered appellant's arguments collectively.[6]

The ground alleged in appellant's motion to quash was, "Unconstitutional, Vagueness, Indefiniteness, Ambiguity, and Uncertainty."[7] He made three claims:

- "The harassment statute 42.07(a)(7) has been held facially unconstitutional," citing *Karenev v. State*, 258 S.W.3d 210 (Tex. App.—Fort Worth 2008),[8] a vagueness case reversed on preservation, 281 S.W.3d 428 (Tex. Crim. App. 2009).

- The information does not give adequate notice of the specific incidents of harassment.[9]

- Numerous decisions have "invalidated statutes that contained the terms 'annoy' and 'alarm' as implicating First Amendment freedoms and being unduly vague."[10]

He did not expound upon these claims. He concluded: "The Defendant argues that

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4 1 CR 45-46 (motion to quash), 49-51 (writ).

5 2 RR et seq. (motion to quash); 4 RR et seq. (writ).

6 4 RR 4.

7 1 CR 45.

8 1 CR 45.

9 1 CR 45.

10 1 CR 46 (citing *Long v. State*, 931 S.W.2d 285 (Tex. Crim. App. 1996), *May v. State*, 765 S.W.2d 438 (Tex. Crim. App. 1989) (probably, as his citation leads to *Long*), and *Kramer v. Price*, 712 F.2d 174 (5th Cir. 1983), *on reh'g*, 723 F.2d 1164 (5th Cir. 1984)).

Statute 42.07 is 1) overly broad and chills the protected speech of the First Amendment, 2) is unconstitutional on its face, see *Karenev* and 3) is unconstitutional as applied to Defendant."[11]

At the hearing on his motion, appellant argued the statute is unconstitutional for the reasons set forth in the Second Court's opinion in *Karenev*: it uses vague terms like "annoy" and "alarm" and does not make clear whose sensibilities must be offended.[12] Appellant argued that the statute is vague as applied to him because he has no idea which of the "thousands of e-mails and text messages between his ex-wife" and him are alleged to be against the law.[13] Defense counsel twice said the statute "chills" or has a "chilling effect" on protected speech.[14] The trial court denied the motion to quash eleven days later in open court based on *Karenev*'s negative history.[15]

Appellant filed his writ one month later.[16] It was based entirely on the statute's alleged vagueness:

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[11] 1 CR 46.

[12] 2 RR 5-8.

[13] 2 RR 8. The information does not specify the content of any of the electronic communications. 1 CR 5-8.

[14] 2 RR 5, 15, 16.

[15] 3 RR 4.

[16] 1 CR 49.

- "[B]ecause the statute does not establish a clear standard for whose sensibilities must be offended, it is unconstitutionally vague in that the standard of conduct it specifies is dependent on each complainant's sensitivity."[17]

- "[T]he intent to 'harass, annoy, alarm, abuse, torment, or embarrass' set out in section §42.07(a)(7) does nothing to limit the vagueness originally generated by 'annoy' and 'alarm[.]'"[18]

- Unspecified "additional terms" "are themselves 'susceptible to uncertainties of meaning.'"[19]

Based on its written and oral responses, the State understood appellant to be challenging only the alleged vagueness of the statute.[20] The hearing on the writ did nothing to alter that understanding. Appellant asked the trial court to find the statute "is unconstitutional on its face and it is vague for the same arguments we made in the Motion to Quash."[21] In passing, appellant referred to "the *Scott* case" because it was cited by a case relied upon by the State.[22] This was a reference to *Scott v. State*, an important vagueness case from this Court.[23] His argument against *Scott* was, "If you look it up on Westlaw, or whatever system you use, you'll see that red flag pop up

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17 1 CR 50.

18 1 CR 50.

19 1 CR 50.

20 1 CR 57 (State's written summary of writ grounds); 4 RR 6-7 (argument at hearing).

21 4 RR 5. *See also* 4 RR 9-10 (reiterating vagueness of words like "annoy").

22 4 RR 8.

23 *Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010).

immediately[.]"[24] The trial court denied the writ, explaining (again) only that *Karenev* is not binding authority.[25]

Appellant raised three arguments on appeal. The first was "vagueness," in which he argued the statute is unconstitutionally vague as applied to everyone including him.[26] The third was lack of notice.[27] The second, as set out in his summary, was: "First Amendment _ The statute additionally chills the protected Free Speech granted under the First Amendment of the U.S. Constitution and the Texas State Constitution."[28] The argument was entitled, "Section 42.07(a)7 (sic) chills First Amendment protected speech."[29] He argued that a statute that curtails free speech must be "sufficiently definite" and that the statute at issue "lacks any clear definitive [prohibited] behavior by using terms that are widely subjective (sic) to interpretation."[30] The only case he cited for the chilling of free expression was *Long v. State*, another prominent vagueness case from this Court.[31] He said the holding of

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[24] 4 RR 8.

[25] 4 RR 10-11; 1 CR 63.

[26] App. Br. at 4-8.

[27] App. Br. at 11-14.

[28] App. Br. at 3.

[29] App. Br. at 8.

[30] App. Br. at 9.

[31] App. Br. at 9.

Lebo v. State, 474 S.W.3d 402 (Tex. App.—San Antonio 2015, pet. ref'd), which applied *Scott*'s holding on Section 42.07(a)(4) to Section 42.07(a)(7), was "outright ridiculous" because texts are nothing like "calling and hanging up."[32] In the last sentence of his conclusion, appellant said the statute has "an overly broad reach."[33]

SUMMARY OF THE ARGUMENT

The court of appeals declared Section 42.07(a)(7) unconstitutionally vague and overbroad based, in large part, on arguments appellant never made in his losing efforts in the trial court or on appeal. As a result, the court's analysis is not only unnecessary, in large part, but flawed. The only issue properly before this Court is the alleged vagueness of the statute. Section 42.07(a)(7) gives persons of ordinary intelligence adequate notice of what is prohibited.

ARGUMENT

I. An overview of the doctrines at issue.

A. Overbreadth

The overbreadth doctrine does not exist outside of the First Amendment context.[34] It is an exception to many of the normal rules for facial challenges.[35] It is

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[32] App. Br. at 10.

[33] App. Br. at 10.

[34] *United States v. Salerno*, 481 U.S. 739, 745 (1987); *McGruder v. State*, 483 S.W.3d 880, 883 (Tex. Crim. App. 2016).

[35] *Virginia v. Hicks*, 539 U.S. 113, 118 (2003).

what a defendant raises when he cannot claim a statute is unconstitutional as applied to everyone—usually himself—under the requisite level of scrutiny.[36] The Supreme Court "provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions."[37]

But there are "substantial costs" to interfering with legitimate government interests.[38] "[T]here comes a point where that [chilling] effect—at best a prediction—cannot, with confidence, justify . . . prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe."[39] The "'strong medicine'" of facial invalidation for overbreadth is thus "to be employed with hesitation and only as a last resort."[40]

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[36] *State v. Johnson*, 475 S.W.3d 860, 864-65 (Tex. Crim. App. 2015) ("[U]nder the First Amendment's 'overbreadth' doctrine, a law may be declared unconstitutional on its face, even if it may have some legitimate application and even if the parties before the court were not engaged in activity protected by the First Amendment."). Regulation of protected speech is reviewed under one of two levels of scrutiny: strict or intermediate. Both standards require that a statute be appropriately tailored to suit the requisite level of government interest.

[37] *Hicks*, 539 U.S. at 119.

[38] *Id*.

[39] *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

[40] *Ex parte Thompson*, 442 S.W.3d 325, 349 (Tex. Crim. App. 2014) (quoting *New York v. Ferber*, 458 U.S. 747, 769 (1982)).

To that end, the defendant bears the burden[41] to prove the statute's overbreadth is "substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."[42] "The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers."[43] Then the legitimate sweep of the statute must be determined by applying the appropriate level of scrutiny; only then can a defendant even attempt to show how much protected speech is restricted and how much of that restriction is unconstitutional. This estimate "must be realistic and not based on fanciful hypotheticals."[44] If the amount of unconstitutionally restricted protected speech is not substantial in relation to the speech and non-speech the statute lawfully restricts, the statute should be left alone. Any unsubstantial overbreadth should be addressed through as-applied challenges.[45]

B. Vagueness

"Vagueness" is a different type of facial challenge. Although often raised with overbreadth, they do not arise out of the same constitutional right. "Vagueness

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[41] *Hicks*, 539 U.S. at 122; *Ex parte Perry*, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016); *Johnson*, 475 S.W.3d at 865.

[42] *Johnson*, 475 S.W.3d at 865 (citation omitted).

[43] *United States v. Williams*, 553 U.S. 285, 293 (2008).

[44] *Id*. (quotation omitted).

[45] *Broadrick*, 413 U.S. at 615-16.

doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment."[46] A statute is impermissibly vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[47] Whereas a violation of the First Amendment presents what many believe to be a quintessential violation of substantive constitutional law, a statute that is unconstitutionally vague "violates the first essential of due process of law."[48]

C. Overbreadth and vagueness are not flipsides of the same coin.

Some confusion is understandable because high courts conflate the doctrines to varying degrees. The Supreme Court has said that a "more stringent vagueness test" applies when protected speech is affected[49] because "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked."[50] This Court has gone so far as to accept a defendant's characterization that a statute "is overbroad *because* it is

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[46] *Williams*, 553 U.S. at 304.

[47] *Id*.

[48] *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926). *See also Sessions v. Dimaya*, 138 S. Ct. 1204, 1233 (2018) (Gorsuch, J., concurring) ("Vagueness doctrine represents a procedural, not a substantive, demand.").

[49] *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

[50] *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotations omitted). *See also State v. Doyal*, __ S.W.3d __, No. PD-0254-18, 2019 WL 944022, at *5 (Tex. Crim. App. Feb. 27, 2019), reh'g denied (June 5, 2019) (a statute affecting First Amendment rights must be "sufficiently definite to avoid chilling protected expression").

inherently vague."[51]

But the Supreme Court has curtailed the argument that the First Amendment affects a vagueness challenge. "[A] Fifth Amendment vagueness challenge does not turn on whether a law applies to a substantial amount of protected expression[,]" as would be the case if the challenger had "a valid overbreadth claim under the First Amendment."[52] "[E]ven to the extent a heightened vagueness standard applies, a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice."[53] "Otherwise the doctrines would be substantially redundant."[54]

Moreover, vagueness and overbreadth must be different because one cannot apply both doctrines. Overbreadth requires construing the statute, but a statute is unconstitutionally vague precisely because its coverage cannot be ascertained. When that happens, a court should not reach overbreadth.[55]

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[51] *Scott*, 322 S.W.3d at 671 n.16 (emphasis in original). *See also id.* at 665 n.3 ("[I]f the statute, as authoritatively construed, is susceptible of application to speech guaranteed by the First Amendment[,] then the defendant is permitted to argue that the statute is overbroad on its face because it is unclear whether it regulates a substantial amount of protected speech. . . . In the cases before us today, Scott's argument, as we understand it, is that § 42.07 is overbroad on its face because its inherent vagueness makes it unclear whether it prohibits a substantial amount of protected speech.") (citations omitted).

[52] *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010).

[53] *Id*.

[54] *Id*.

[55] *See*, *e.g.*, *Doyal*, 2019 WL 944022, at *10 (striking statute for vagueness but not addressing (continued...)

II. This is not the case in which to reconsider *Scott v. State*.

The court of appeals's opinion is based in large part on its conclusion that *Scott* has been overruled. In *Scott*, this Court held that another subsection of this statute, (a)(4), does not apply to "communicative conduct that is protected by the First Amendment" because the actor's conduct "will be, in the usual case, essentially noncommunicative, even if the conduct includes spoken words."[56] Although the Court noted three elements, it focused on two: 1) someone whose conduct satisfies the elements "will have only the intent to inflict emotional distress for its own sake[,]" and, 2) to the extent any of it is "communicative," such conduct would constitute an intolerable invasion of privacy.[57] Many courts around the country agree

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[55](...continued)
overbreadth). As the Supreme Court said in *Hoffman Estates*:

> Flipside also argues that the ordinance is "overbroad" because it could extend to "innocent" and "lawful" uses of items as well as uses with illegal drugs. This argument seems to confuse vagueness and overbreadth doctrines. If Flipside is objecting that it cannot determine whether the ordinance regulates items with some lawful uses, then it is complaining of vagueness.

455 U.S. at 497 n.9 (citations omitted).

[56] *Scott*, 322 S.W.3d at 669-70.

[57] *Id*. at 670. *See also Wagner v. State*, 539 S.W.3d 298, 311 (Tex. Crim. App. 2018) (applying *Scott*'s reasoning to uphold a protective order statute that prohibits harassing communications because it is "capable of reaching only conduct that is not entitled to constitutional protection because such conduct will, by definition, invade the substantial privacy interests of the complainant in an essentially intolerable manner."); *Ex parte Thompson*, 442 S.W.3d at 342-43 (distinguishing *Scott* because, unlike § 42.07(a)(4), "the statute at issue in the present case is not limited to expressive activity that occurs in relatively private settings nor to activity that intentionally inflicts emotional harm on the victims.").

that intentional harassment is not First Amendment speech.[58] *Scott* continues to be a stumbling block for defendants, this case notwithstanding.[59]

If the issues in this case hinged on whether the First Amendment is implicated, it would be necessary to examine *Scott* and decide whether its reasoning applies to a parallel subsection of the same statute. That is unnecessary for four reasons.

A. Overbreadth is not an issue.

The first reason to determine the statute's impact on the First Amendment would be that an overbreadth claim requires it. But appellant never raised one in any court. He did not cite any cases or apply the standard of review, even in plain

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[58] *United States v. Osinger*, 753 F.3d 939, 947 (9th Cir. 2014) ("Osinger engaged in a course of conduct 'with the intent ... to ... harass, or intimidate, or cause substantial emotional distress to' V.B. . . . Any expressive aspects of Osinger's speech were not protected under the First Amendment because they were 'integral to criminal conduct' in intentionally harassing, intimidating or causing substantial emotional distress") (overruling as-applied challenge to federal stalking statute); *Gilbreath v. State*, 650 So. 2d 10, 12 (Fla. 1995) ("it is the conduct of intentionally making such a call into a place of expected privacy, not pure speech, which is proscribed" because the statute requires "the intent to annoy, abuse, threaten, or harass the recipient of the call"); *State v. Dyson*, 872 P.2d 1115, 1119 (1994) ("[The statute] regulates conduct implicating speech, not speech itself. Although [the statute] contains a speech component, it is clearly directed against specific conduct—making telephone calls with the intent to harass, intimidate, or torment another while using lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act.") (citation omitted); *State v. Thorne*, 333 S.E.2d 817, 819 (1985) ("Harassment is not communication, although it may take the form of speech. The statute prohibits only telephone calls made with the intent to harass. Phone calls made with the intent to communicate are not prohibited."). *Thorne* was quoted in *Scott*, 322 S.W.3d at 670 n.14.

[59] *See*, *e.g.*, *Ex parte Nuncio*, 579 S.W.3d 448, 456-57 (Tex. App.—San Antonio 2019, pet. granted, 2019 PD-0478-19) (overbreadth and vagueness of sections 42.07(a)(1) and (b)(3)); *Ex parte Sanders*, No. 07-18-00335-CR, 2019 WL 1576076, at *5 (Tex. App.—Amarillo Apr. 8, 2019, pet. granted PD-0469-19) (overbreadth of section 42.07(a)(7)); *Blanchard v. State*, No. 03-16-00014-CR, 2016 WL 3144142, at *4 (Tex. App.—Austin June 2, 2016, pet. ref'd) (overbreadth and vagueness of section 42.07(a)(7)).

language. Words like "chill" or combinations of "over" and "broad" are not enough, as they appear in numerous First Amendment contexts including vagueness.[60] In context, his invocation of the First Amendment was merely an attempt to obtain the benefits traditionally afforded vagueness claims when speech is involved.

If the complete failure to invoke the overbreadth doctrine were not enough, appellant's consistent argument that the statute is vague means he never construed it to determine its legitimate sweep. In fact, the court of appeals did not actually perform an overbreadth analysis, either. Despite quoting the appropriate standard,[61] it performed a vagueness analysis, held "the subsection suffers from a fatal flaw of vagueness," and then concluded it "has the potential to reach a vast array of communications" like President Trump's tweets and ex-spouses' emails, making it "overbroad."[62] That the court of appeals did not attempt to determine the legitimate

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[60] *See*, *e.g.*, *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 556 (2014) ("We crafted the *Noerr–Pennington* doctrine—and carved out only a narrow exception for 'sham' litigation—to avoid chilling the exercise of the First Amendment right to petition the government for the redress of grievances."); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 381 n.3 (1992) (distinguishing between a "technical 'overbreadth' claim" and a claim an ordinance is "overbroad" in the sense of restricting more speech than the Constitution permits because it is content based); *Doyal*, 2019 WL 944022, at *5 ("When the law also implicates First Amendment freedoms, it must also be sufficiently definite to avoid chilling protected expression."); *Long*, 931 S.W.2d at 293 ("In the absence of any nexus between the threat requirement and the conduct requirement, there is a real likelihood that the statute could chill the exercise of protected First Amendment expression.").

[61] *Ex parte Barton*, No. 02-17-00188-CR, 2019 WL 4866036, at *6 (Tex. App.—Fort Worth Oct. 3, 2019, reh'g, pet. granted).

[62] *Id*. at *8-10.

sweep of the statute is understandable; a statute that is void for vagueness has none. But that is precisely why overbreadth is a non-issue, not a foregone conclusion.

B. Appellant raised an as-applied challenge.

The second reason to determine the statute's impact on the First Amendment would be the argument that its presence means appellant does not have to show a statute is vague as to him to obtain relief.[63] As mentioned above, the Supreme Court rejected this argument in *Humanitarian Law Center*. This is not to say that an as-applied challenge would itself be cognizable in a pretrial writ—it is not.[64] But a complaining party must at least attempt to show that he can pass an examination of his alleged conduct "designed to quickly dispose of unmeritorious facial claims."[65]

Based on statements in *Doyal*, this Court might disagree with this conclusion.[66] This disagreement may need to be addressed in another case presently before the

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[63] *See*, *e.g.*, *Long*, 931 S.W.2d at 288 ("[W]hen a vagueness challenge involves First Amendment considerations, a criminal law may be held facially invalid even though it may not be unconstitutional as applied to the defendant's conduct."); *Scott*, 322 S.W.3d at 665, 670-71 (rejecting a facial vagueness challenge because the statute did not implicate the First Amendment and Scott did not argue that it was vague as applied to him).

[64] *See State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 910 (Tex. Crim. App. 2011) ("as applied" challenges cannot be decided pretrial because they require evidence). *But see Ex parte Perry*, 483 S.W.3d at 895 (listing exceptions to this rule).

[65] *Ex parte Ellis*, 309 S.W.3d 71, 82 (Tex. Crim. App. 2010).

[66] *Doyal*, 2019 WL 944022, at *4 (suggesting *Humanitarian Law Center* was overruled by a more recent case and "conclud[ing] that a facial vagueness challenge to a statute that implicates First Amendment freedoms does not require a showing that there are no possible instances of conduct clearly falling within the statute's prohibitions.").

Court,[67] but it need not be addressed here. Appellant has consistently said that no one, himself included, knows what is criminal under the statute. He effectively claims it has no discernible core.[68] And because there are no factual allegations in the charging instrument—something he complained of separately—we cannot know whether his conduct is clearly proscribed.[69]

C. "Greater specificity" is not a factor.

The third reason to determine the statute's impact on the First Amendment would be the argument that any impact requires a greater level of specificity.[70] As noted above, the Supreme Court expressed doubt that a heightened standard applies when protected speech is implicated.[71] Regardless, it is unclear what a heightened level of specificity looks like in practice and therefore whether it matters. Vague is

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[67] *See Ex parte Nuncio*, PD-0478-19 (granted 8/21/19).

[68] *See Smith v. Goguen*, 415 U.S. 566, 578 (1974) (some laws are "vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. Such a provision simply has no core.") (quotation and citation omitted).

[69] The alternative would be to hold a defendant cannot complain about vagueness without successfully mounting a motion to quash, furthering the merger of the two complaints presented in *State v. Ross*. 573 S.W.3d 817, 821 (Tex. Crim. App. 2019) (adopting without deciding, but finding some sense to, the court of appeals's decision to address a statute's vagueness before determining whether Ross had adequate notice).

[70] *Doyal*, 2019 WL 944022, at *5.

[71] *Humanitarian Law Center*, 561 U.S. at 20 ("even to the extent a heightened vagueness standard applies . . ."), 21 ("Even assuming that a heightened standard applies . . .").

vague. Appellant claims the material terms are indefinite, the requisite intent does not fix it, and the "reasonably likely" language does not provide an objective standard. The statute satisfies due process or it does not.

D. Appellant failed to preserve the argument that *Scott* is invalid.

Even if there was something to be gained from deciding the "First Amendment" issue, appellant never presented any of the necessary arguments to the trial court (or court of appeals).

The court of appeals recognized *Scott*'s holding, *i.e.*, that a substantially similar subsection of the same statute involves conduct that is "essentially noncommunicative" because the actor "will have only the intent to inflict emotional distress for its own sake."[72] The court of appeals claimed this portion of *Scott* was overruled by *Wilson v. State*, 448 S.W.3d 418 (Tex. Crim. App. 2014).[73] It also said that it arrived at the same conclusion "four years after *Wilson*" in its opinion in *Karenev*.[74] But *Wilson* did not purport to reverse the relevant reasoning of *Scott*—it merely rejected the argument that a claim of legitimate communication could negate

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[72] *Ex parte Barton*, 2019 WL 4866036, at *4 (quoting *Scott*, 322 S.W.3d at 669-70).

[73] *Id*. at *4-5.

[74] *Id*. at *5. *See Karenev*, 258 S.W.3d at 213.

the sufficiency of the evidence.[75] And the court of appeals's opinion in *Karenev* was written two years *prior* to *Scott* (and six years *prior* to *Wilson*), and was reversed on preservation, making its "holding" irrelevant.

Regardless of the merits of these arguments, appellant raised none of them. His motion to quash made the bare assertion that the statute "chills . . . protected speech of the First Amendment."[76] He added nothing at the hearing. His writ did not mention speech. His only mention of *Scott* was in response to the State's trial briefing, and his only argument was that a "red flag" pops up when you search for it on Westlaw.[77] He never mentioned *Wilson*, which was decided before the trial proceedings in this case, nor did he present reasoning comparable to that offered by the court of appeals. Even in his brief—which would be too late—his only argument against applying *Scott*'s reasoning to this subsection is that calling and hanging up is nothing like repeated electronic communications.[78] But subsection (a)(4) also includes "repeated telephone communications," as *Scott* and *Wilson* make clear. At

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[75] *Wilson*, 448 S.W.3d at 425 ("First, a plain-language reading of § 42.07(a)(4) does not excuse from criminal culpability the act of making prohibited repeated telephone communications if the content of the communications is facially 'legitimate,' however that term may be defined. Second, the existence of evidence that may support the conclusion that the call had a facially legitimate purpose does not legally negate the prohibited intent or manner of the call.").

[76] 1 CR 46.

[77] 4 RR 8.

[78] App. Br. at 10.

no point, then, did appellant give any court any reason to rule in his favor on these issues.

E. Conclusion

This Court reviews decisions of courts of appeals. The ultimate decision under review is whether the court of appeals was correct to find the trial court abused its discretion. Appellant lost in the trial court. When a party loses, his argument on appeal is limited to the arguments he made at trial.[79] This rule should apply with more force when that party wants a statute declared unconstitutional and/or the First Amendment is implicated, not less. Pretrial writs on First Amendment issues are hard when the issues are adequately presented. They become unmanageable when the State and reviewing courts are required to think up, raise, and then evaluate arguments the movant never made.[80]

Appellant never presented any of the arguments the court of appeals deemed necessary to overcome *Scott*. He never made an overbreadth challenge. And, as

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[79] *State v. Mercado*, 972 S.W.2d 75, 78 (Tex. Crim. App. 1998) ("the trial court cannot be held to have abused its discretion in ruling on the only theory of law presented to it.").

[80] So complex are the arguments in these weighty, interlocutory cases that perhaps decisions should be *upheld* only on the arguments presented to the trial court. *See State v. Esparza*, 413 S.W.3d 81, 90 (Tex. Crim. App. 2013) ("If the alternative legal theory that an appellee proffers for the first time on appeal as a basis to affirm a trial court's otherwise faulty judgment turns upon the production of predicate facts by the appellant that he was never fairly called upon to adduce during the course of the proceedings below, then application of the *Calloway* rule to affirm that otherwise faulty judgment works a manifest injustice.").

argued below, not even the court of appeals completed the analysis by considering whether any restrictions on protected speech were constitutional. This Court should consider the "First Amendment" issue only if it finds the statute is not vague and concludes that overbreadth was preserved.

III. The statute is not vague.

Appellant argued, and the court of appeals agreed, that the statute is unconstitutionally vague because terms like "annoy" are indefinite and the statute does not say whose sensibilities would be offended. Viewed in light of the requirements of due process and this Court's relevant cases, the statute gives people of ordinary intelligence fair notice of what is prohibited.

A. Perfection is not required.

"A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[81] The second part may be the most important: "Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law" that it "allows policemen, prosecutors, and juries to pursue their

[81] *Williams*, 553 U.S. at 304. The basic test for vagueness was written almost 100 years ago. *Connally*, 269 U.S. at 391 ("a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.").

personal predilections."[82]

But the Constitution does not require perfection. "Condemned to the use of words, we can never expect mathematical certainty from our language."[83] A statute is not unconstitutionally vague merely because the words or terms used must be construed.[84] Nor is a statute rendered vague because "close cases can be envisioned"; "[c]lose cases can be imagined under virtually any statute."[85] "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is."[86] Even a statute "marked by flexibility and reasonable breadth, rather than meticulous specificity," can be upheld if its interpretation makes it "clear what the ordinance as a whole prohibits."[87]

To determine what a statute prohibits, a reviewing court must consider the plain language, the court's interpretations of analogous statutes, and, "perhaps to some degree, . . . the interpretation of the statute given by those charged with

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82 *Goguen*, 415 U.S. at 574-75.

83 *Grayned*, 408 U.S. at 110.

84 *Wagner*, 539 S.W.3d at 314.

85 *Williams*, 553 U.S. at 305-06.

86 *Id*. at 306.

87 *Id*. (internal quotation and citation omitted).

enforcing it."[88] While many terms have expansive meanings that could lead to lack of notice or arbitrary enforcement, the inclusion of an objective standard[89] or scienter requirement[90] can alleviate, if not eliminate, that danger.

Finally, a statute is not unconstitutional because it cannot be mechanically applied. "As always, enforcement requires the exercise of some degree of police judgment[.]"[91] And "it is common experience that different juries may reach different results under any criminal statute[; t]hat is one of the consequences we accept under our jury system."[92] Thus, the fact that one might be incorrectly (though reasonably) suspected or even convicted of violating a criminal offense is no reason to erase it

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[88] *Grayned*, 408 U.S. at 110.

[89] *See Williams*, 553 U.S. at 306 ("Thus, we have struck down statutes that tied criminal culpability to whether the defendant's conduct was "annoying" or 'indecent'—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings."); *Ross*, 573 S.W.3d at 823-24 (the "reasonable-person standard greatly reduces . . . susceptibility to a vagueness challenge"); *State v. Holcombe*, 187 S.W.3d 496, 500 (Tex. Crim. App. 2006) ("Although the noise ordinance does allow a degree of police judgment, that judgment is confined to the judgment of a reasonable person.").

[90] *Williams*, 553 U.S. at 306 ("Whether someone held a belief or had an intent is a true-or-false determination, not a subjective judgment such as whether conduct is 'annoying' or 'indecent.'"), *id*. at 306 (a statute is not vague when it requires the jury to answer "clear questions of fact" like the defendant's belief or intent); *McFadden v. United States*, 135 S. Ct. 2298, 2307 (2015) ("a scienter requirement in a statute alleviates vagueness concerns, narrows the scope of its prohibition, and limits prosecutorial discretion.") (cleaned up); *Doyal*, 2019 WL 944022, at *5 ("A scienter requirement in the statute may sometimes alleviate vagueness concerns but does not always do so.").

[91] *Grayned*, 408 U.S. at 114; *see also Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989) (upholding ordinance despite "undoubtedly flexible" standards giving officials "considerable discretion").

[92] *Roth v. United States*, 354 U.S. 476, 492 n.30 (1957).

from the Penal Code. The Due Process Clause guarantees basic standards for notice and conviction, not freedom from undesirable outcomes.

B. But the statute must have a "core."

The most obvious example of an unconstitutionally vague statute is one that on its face has no specified standard at all, *i.e.*, no "core." In *Coates v. City of Cincinnati*, for example, Coates was charged with assembling "in a manner annoying to persons passing by."[93] The court said the ordinance "is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard."[94] Because it was unclear "upon whose sensitivity a violation does depend—the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man[,]"[95] "no standard of conduct [wa]s specified at all."[96]

Quoting *Coates*, the court later said that such a provision "is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of

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[93] 402 U.S. 611, 611 (1971).

[94] *Id*. at 614.

[95] *Id*. at 613. *See also id*. at 614 ("violation may entirely depend upon whether or not a policeman is annoyed").

[96] *Id*. at 614.

conduct is specified at all.' Such a provision simply has no core."[97] A statute that has no "core" is facially unconstitutional regardless of whether there is some conduct that clearly falls within the provision's grasp.[98]

C. Application.

If the statute simply prohibited actors from being annoying, or harassing, or alarming to other people, it might suffer the same fate as the ordinance in *Coates*.[99] But the Supreme Court affirmed in that case that government "is free to prevent people from . . . engaging in countless other forms of antisocial conduct . . . through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited."[100] That is what the Legislature did here. It prohibited repeated antisocial electronic communications initiated by the actor that are objectively harassing and made with the intent to harass.

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[97] *Goguen*, 415 U.S. at 578 (quoting *Coates*, 402 U.S. at 614).

[98] *Johnson v. United States*, 135 S. Ct. 2551, 2561 (2015). *See Coates*, 402 U.S. at 616 ("The details of the offense could no[t] . . . serve to validate this ordinance[.]").

[99] A large part of *Coates*'s holding is based on the statute impacting the freedom of assembly in a public place, which plainly involves First Amendment concerns. 402 U.S. at 615-16. Sending electronic communications to someone is not comparable to organizing in a quintessential public forum.

[100] *Id*. at 614.

1. "Harassment" uses terms with common meanings.

Throughout this brief, the term "harass" has been used as shorthand for the six terms listed disjunctively—harass, annoy, alarm, abuse, torment, or embarrass. These terms all have plain meanings. This Court said so in *Scott*.[101] It returned to the dictionary twice in the last two years to interpret the same terms in different statutes.[102] The problem is not that the terms themselves are unknowable.

2. The terms are qualified by an objective standard.

Instead, the typical problem with harassment statutes is the lack of clarity as to whose sensibilities set the standard. Again, this Court answered this question in *Scott*, saying "manner reasonably likely to harass" means an average person would be harassed.[103] Unfortunately, it did not mention that *Long* said the opposite 14 years earlier.[104] *Long*'s rationale, while thoroughly explained, was undercut—if not erased—by this Court's decision earlier this year in *State v. Ross*.

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[101] *Scott*, 322 S.W.3d at 669 n.13 ("The terms 'harass,' 'annoy,' 'alarm,' 'abuse,' 'torment,' 'embarrass,' and 'offend' all have commonly understood definitions that are relevant in this context.").

[102] *Ross*, 573 S.W.3d at 821-22 (using "[a] common dictionary" and context to conclude that "alarm" meant "to strike with fear" or "to 'disturb, excite.'"); *Wagner*, 539 S.W.3d at 309 (a manner of communication is "harassing" under Section 25.07, violation of certain court orders, if it would "persistently disturb, bother continually, or pester," the latter term meaning "troubling or annoying someone with frequent or persistent requests or interruptions.").

[103] *Scott*, 322 S.W.3d at 669.

[104] *Long*, 931 S.W.2d at 289-90.

In *Ross*, this Court reviewed the vagueness of the phrase "intentionally or knowingly . . . display[ing] a firearm or other deadly weapon in a public place in a manner calculated to alarm."[105] After recognizing that "calculated" is ambiguous, the Court decided that it "is best understood to mean 'likely,' according to an objective standard of reasonableness and from the perspective of an ordinary, reasonable observer."[106] One of the reasons was policy. "[C]onstruing 'calculated' to refer to objective probability rather than subjective intent would put the statute on surer constitutional footing from a vagueness perspective"[107] because it "tends to invoke the reasonable-person standard."[108] Linking the two "greatly reduces [the statute's] susceptibility to a vagueness challenge—because compliance with the statute would not turn upon the unknowable, idiosyncratic sensibilities of whoever may be present."[109] This would help avoid "arbitrary and discriminatory enforcement."[110]

This Court should follow *Ross* and hold that the phrase "and is reasonably likely to harass" embraces the reasonable-person standard.

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[105] 573 S.W.3d at 819, 821. *See* TEX. PENAL CODE § 42.01(a)(8) (disorderly conduct for displaying a firearm).

[106] *Id*. at 822.

[107] *Id*. at 823.

[108] *Id*.

[109] *Id*. at 823-24.

[110] *Id*. at 826.

3. "Harass" is also dictated by the defendant's intent.

Further eschewing a statute based on the victim's sensibilities, the statute does not require that she feel harassed. Instead, the focus is on the actor's intent. This avoids any inherent confusion. As Judge Johnson said in *Scott* of the same intent:

> Harassment is in the mind of the speaker, not the hearer. The speaker who intends to harass, annoy, alarm, abuse, torment, embarrass, or offend another has himself defined, for that purpose, both the applicable term and the word "repeatedly." They are not vague or over-broad for the speaker; they are clearly and precisely known. There is no ambiguity of intent in the mind of the speaker, and intent undergirds the offense.[111]

A plurality of the Supreme Court said the same thing almost 75 years ago: "[W]here the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law."[112]

D. Conclusion

Section 42.07(a)(7) takes words with common meanings, limits their application to situations in which a reasonable person would be affected, and layers upon that an intent requirement. A person of ordinary intelligence can complain

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[111] *Scott*, 322 S.W.3d at 671 (Johnson, J., concurring). *See Constantino v. State*, 255 S.E.2d 710, 713 (Ga. 1979) ("The point is that the defendant telephones intending to harass and the defendant certainly knows if he is doing that.").

[112] *Screws v. United States*, 325 U.S. 91, 102 (1945) (plurality).

about the statute's breadth or the wisdom of regulating "electronic communications" generally but he cannot reasonably claim he does not know what is prohibited.

IV. Intentional harassment is not communication.

If this Court addresses either the court of appeals's argument about *Scott* or overbreadth, it must also consider arguments the court of appeals never did (because it was not asked to).

A. *Scott* still makes sense, perhaps more so in this case.

The subsection at issue is non-communicative for the same reason that "caus[ing] the telephone of another to ring repeatedly or mak[ing] repeated telephone communications anonymously or in a manner reasonably likely to harass" is. It has the same intent to harass and the same objective standard. Further, in light of how courts view cellular phones, "send[ing] repeated electronic communications in a manner reasonably likely to harass" is at least the invasion of substantial privacy interests in an essentially intolerable manner that repeated, nondescript phone calls are. For better or worse, cell phones have become the center of many people's lives. Both this Court and the Supreme Court have recognized their centrality to average Americans, in large part due to the fact that people put their lives on their phones.[113]

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[113] *Riley v. California*, 573 U.S. 373, 395 (2014) ("[I]t is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate."); *State v. Granville*, 423 (continued...)

It is the way in which many interact with others—via text, chat, various forms of social media, and (rarely) actual talking. Reaching into a person's device to harass them where they virtually live is every bit the violation that calling a land line is. Maybe more. This kind of antisocial conduct should not be considered "communication" just because words might be used.

B. Incidental restriction of legitimate communication does not end the inquiry.

That some protected speech might be implicated by the statute does not mean the statute is overbroad. A statute is not over-anything unless the impact on the First Amendment is improper, *i.e.*, not in accord with the requisite standard of review. Neither appellant nor the court of appeals attempted to determine whether any impact on protected speech was legitimate. If either had, they might have realized that the statute operates as a proper regulation of manner.

If there is such a thing as "dual intent" speech—"legitimate" communication that is intentionally harassing—courts must consider whether the speech that is affected is validly restricted as a limitation on the manner of communication. "[E]ven in a public forum[,] the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without

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[113](...continued)
S.W.3d 399, 417 (Tex. Crim. App. 2014) (basing its ruling on "modern technology and the incredible amount of personal information stored and accessible on a cell phone").

reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[114]

The "principal inquiry" is "content neutrality."[115] "Content neutrality" is not determined by the fact that a particular kind of speech is regulated; that exception would swallow the rule. "In some situations, a regulation can be deemed content neutral on the basis of the government interest that the statute serves, even if the statute appears to discriminate on the basis of content."[116] "These situations involve government regulations aimed at the 'secondary effects' of expressive activity."[117] The second step is that the regulation be "narrowly tailored to serve a significant governmental interest."[118] As with intermediate scrutiny, this requirement is satisfied as long as the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation."[119] The final step is the availability

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[114] *Ward*, 491 U.S. at 791 (quotation omitted).

[115] *Id*.

[116] *Ex parte Thompson*, 442 S.W.3d at 345.

[117] *Id*.

[118] *Ward*, 491 U.S. at 796.

[119] *Id*. at 799 (quotation and citation omitted).

of "ample alternative channels of communication."[120]

Under the *Ward* rubric, a law protecting people from a manner and mode of communication rather than its content or effect on the listener is content-neutral and serves a substantial privacy interest that would obviously be served less well without it. Whatever legitimate message the actor wishes to convey can be done more respectfully and effectively outside the ambit of the statute. There are plenty of ways to share ideas without repeatedly being intentionally and objectively harassing.

C. Reliance on *Stevens* and *Reed* to overrule all of this law is risky.

The counter argument to these cases appears to be that *Scott* and *Ward* have been overruled, explicitly or otherwise, by cases like *United States v. Stevens*[121] and *Reed v. Town of Gilbert*.[122] That is, at best, unclear.

1. *Stevens* limits only the creation of new categories of unprotected communication.

In *Stevens*, the Supreme Court discussed categories of speech it had identified as "fully outside the protection of the First Amendment," like obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.[123] It cautioned that courts

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[120] *Id*. at 802.

[121] 559 U.S. 460 (2010).

[122] 135 S. Ct. 2218 (2015).

[123] *Stevens*, 559 U.S. at 468-71. *But see R.A.V.*, 505 U.S. at 383 (rejecting the idea of "obscenity (continued...)

have no "freewheeling authority to declare new categories of speech outside the scope of the First Amendment."[124] Any speech not on this list, the argument goes, is protected by the First Amendment.

But that begs the question: is something "speech" simply because words are used? Each of the types of speech described in *Stevens* has one characteristic the conduct underlying *Scott*'s rationale does not—the intent to communicate an idea. In fact, they are on the list *because of their message*. Obscenity, defamation, fraud, incitement, and speech integral to criminal conduct can be lawfully proscribed because the publication and receipt of those ideas is bad. Criminalizing conduct committed with the intent to harass is different. While the words used might also be specifically illegal (and perhaps validly prohibited under other sections of the Penal Code as "speech integral to criminal conduct"), the State does not have to prove the intended communication of any idea. One can harass with non-verbal screaming or with "messages" the speaker does not care about, as when one spray-paints a swastika just for shock value. It does not have to be "speech" at all. *Stevens* cannot make what is effectively noise into speech.

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[123](...continued)
'as not being speech at all'" or "categories of speech entirely invisible to the Constitution.").

[124] *Id*. at 472.

2. *Reed* is inconsistent and superficial on this point.

In *Reed*, the Supreme Court discussed at length the focus of a content-based regulation when invalidating a regulatory regime that treated roadside signs differently based on general subject matter—"ideological signs," "political signs," and "qualifying event" signs including religious gatherings.[125] The court applied strict scrutiny because the regulation was "content based on its face."[126]

Two statements are often quoted by defendants:

- "Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny."[127]

- "The Court of Appeals and the United States misunderstand our decision in *Ward* as suggesting that a government's purpose is relevant even when a law is content based on its face. . . . *Ward* had nothing to say about facially content-based restrictions because it involved a facially content-neutral ban on the use, in a city-owned music venue, of sound amplification systems not provided by the city.[128]

Both are misleading. Neither controls this case.

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[125] 135 S.Ct. at 2224-25.

[126] *Id*. at 2227.

[127] *Id*. at 2228.

[128] *Id*.

a. Determining a statute is "content-based" is not nearly as simple as *Reed*'s isolated statements and application suggest.

The problem with the first statement is that it is not true. As Justice Breyer pointed out in his concurrence, there are many kinds of "speech regulated by government that inevitably involve content discrimination, but where a strong presumption against constitutionality has no place."[129] This is separate from commercial speech, which is regulated under intermediate scrutiny despite focusing on specific content.[130] The majority discussed none of this.

But six justices discussed the rationale underlying strict scrutiny at length. As Justices Alito and Kagan said, speaking for three justices each, the point of strict scrutiny is to guard against laws that "may interfere with democratic self-government and the search for truth"[131] or which "raise[] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."[132] When, Justice Kagan said, that threat is not realistically possible, clinging to strict scrutiny any time content is implicated is unnecessary: "We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way

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[129] *Id*. at 2234-35 (Breyer, J., concurring) (listing statutes requiring signs, disclosures, labeling, content of filings, etc.).

[130] *Id*. at 2235.

[131] *Id*. at 2233 (Alito, J., concurring).

[132] *Id*. at 2238 (Kagan, J., concurring) (citations and quotations omitted).

implicate [the First Amendment']s intended function."[133] Justice Breyer, who joined Justice Kagan's concurrence, was blunt: "content discrimination, while helping courts to identify unconstitutional suppression of expression, cannot and should not *always* trigger strict scrutiny."[134]

b. The court's treatment of *Ward* ignored its related "secondary effects" cases.

While it is true that *Ward* involved a facially content-neutral ban on the use, in a city-owned music venue, of sound amplification systems not provided by the city, the rest of the oft-quoted statement is based on the assumption, debunked above, that any regulation that mentions anything with words is "content based" on its face. Regardless, the Supreme Court also has a body of law based on examining the government's intent behind even facially content-related statutes to see if the focus was on "secondary effects" rather than the suppression of ideas. In *City of Renton v. Playtime Theatres*,[135] *Boos v. Barry*,[136] *Reno v. Am. Civil Liberties Union*,[137] and as recently as 2014, in *McCullen v. Coakley*,[138] the Supreme Court considered or

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[133] *Id*. at 2238.

[134] *Id*. at 2234 (Breyer, J., concurring) (emphasis in original).

[135] 475 U.S. 41 (1986).

[136] 485 U.S. 312 (1988) (plurality).

[137] 521 U.S. 844 (1997).

[138] 134 S. Ct. 2518 (2014).

applied this body of law. The idea that *Reed* overruled it without a mention of the doctrine or any of those cases strains credulity.

c. *Reed* generally supports *Scott*'s rationale.

As it specifically relates to *Scott*, the recurring themes of *Reed*'s discussion of content-based statutes shows that lack of a message is a central consideration:

> "Government regulation of speech is content based if a law applies to particular speech *because of the topic discussed or the idea or message expressed*."[139]
>
> "Content-based laws—those that target speech *based on its communicative content*—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[140]
>
> "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions *based on the message a speaker conveys*."[141]
>
> "[D]istinctions drawn *based on the message a speaker conveys* . . . are subject to strict scrutiny."[142]
>
> "[L]aws that cannot be justified without reference to the content of the regulated speech, or that were adopted by the government *because of*

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[139] 135 S.Ct. at 2227 (emphasis added).

[140] *Id*. at 2226 (emphasis added).

[141] *Id*. at 2227 (emphasis added).

[142] *Id*. (emphasis added).

> *disagreement with the message* [*the speech*] *conveys* . . . must also satisfy strict scrutiny."[143]
>
> "[A] speech regulation is content based if the law applies to particular speech because of the *topic discussed* or *the idea or message expressed*."[144]

If, as this Court held in *Scott*, a person has no idea or message behind their intentionally harassing, reasonably-likely-to-harass words, there is no reason to treat it as anything other than noise, let alone to apply strict scrutiny.

d. Bad facts make bad law.

In the end, *Reed* is an unhelpful opinion for practioners for the same reason many unhelpful opinions are unhelpful: the obviousness of the result makes the court less careful. The Supreme Court could have avoided the entire conversation about strict scrutiny because, as Justice Kagan put it, the town's defense of its ordinance "does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test."[145] The facial implausibility of a public safety justification for requiring that signs to church gatherings be smaller or more temporary than ideological or political signs should have doomed the ordinance. But the Court did not restrain itself. Its hard stance, even if taken with the best of intentions, conflicts with the decades of case law

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[143] *Id*. (emphasis added) (bracketed material in original) (internal quotations and citations omitted).

[144] *Id*. (emphasis added).

[145] *Id*. at 2239 (Kagan, J., concurring).

discussed above but unmentioned by the majority. As shown, it is also internally inconsistent. In light of the fact that six justices disagreed with the central point relied upon by *Reed*'s fans, other courts should use *Reed* cautiously.

V. This Court would have to make an overbreadth argument to evaluate.

Appellant had the burden to prove through concrete examples the substantial overbreadth of the statute. Assuming the doctrine was invoked at all, any examples given to the trial court were of the problem allegedly created by a vague law—people disagreeing about what is annoying or harassing.[146] On appeal, which came too late, he added that the statute "prevents a spouse from expressing his true feelings, emotions or needs to his spouse for fear that his speech may be deemed 'annoying' and therefore criminal[,]"[147] but neither he nor the court of appeals considered whether that is true or even reasonable in practice or in light of *Ward*. The court of appeals argued that the statute has the "potential to reach a vast array of communications," including the President's tweets or ex-spouses' e-mails, but only to highlight the scope of the vagueness it had already decided.[148] In short, no one has done any of the work necessary to prove an overbreadth claim.

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[146] 2 RR 7 (the music of Weird Al), 8-9 (arguments with people), 15-16 (statements about Trump supporters); 4 RR 9-10 (Weird Al).

[147] App. Br. at 10.

[148] *Ex parte Barton*, 2019 WL 4866036, at *8.

It is unclear that anyone could. Whatever protected speech that could be improperly limited by a properly construed statute must be dwarfed by the sheer volume of stupid, needlessly, and intentionally hateful words exchanged by those who live on social media, but there is no way to prove that. There is not even a way to estimate it with anything close to a level of confidence justifying striking a statute that has obvious lawful application. With an overbreadth argument this anecdotal, a finding of unconstitutionality would be little more than a statement of personal disagreement with the statute.

VI. Conclusion

Subsection (a)(7) plainly prohibits people from repeatedly reaching out to others through electronic means and intentionally harassing them in a manner that is objectively harassing. If it impacts any First Amendment interest, it does so constitutionally; people who have the right to prevent anyone from reaching them electronically have the right to prohibit only those people whose outreach is intentionally and reasonably harassing.[149] If overbreadth is an issue in this case and there are any unconstitutional applications, they are so relatively rare as to require case-by-case adjudication.

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[149] *See R.A.V.*, 505 U.S. at 388 ("Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.").

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals reverse the judgment of the Court of Appeals and affirm the trial court's denial of appellant's pretrial writ.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 9,601 words.

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The undersigned hereby certifies that on this 20th day of December, 2019, the State's Brief on the Merits has been eFiled and electronically served on the following:

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